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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1408~~ 326

EUSTACE ROPER, NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on March 31, 1966.

Opinions Below

There was no opinion by the New York Supreme Court. The opinion of the Appellate Division (Appendix B, Infra, pp. 2a-5a) is reported at 24 App. Div. 2d 560. The opinion in the New York Court of Appeals (Appendix A, Infra, p. 1a) is reported at 17 N. Y. 2d 711. By order dated May 5, 1966, the Court of Appeals granted Petitioner's motion to amend the remittitur.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1966. A motion for reargument was denied, and a motion to amend the remittitur in this case was granted

on May 5, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution and law of the United States.

Questions Presented

I. May a State Court, without violating a defendant's rights under the Due Process Clause of the XIV Amendment, refuse a defendant's request to charge the jury on the issue of entrapment where (1) there is undisputed evidence that it was the prosecutor who, through his agent, made the initial proposal to defendant that he embark on the unlawful course of conduct resulting in defendant's indictment, and (2) the primary theory of the defense was that defendant had been entrapped?

II. May a State, without offending the Due Process Clause of the XIV Amendment, fail to recognize entrapment as a defense to a criminal prosecution?

Constitutional Provision Involved

Amendment XIV: Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioners were convicted of the crime of Attempted Grand Larceny in the First Degree by False Pretenses, after a trial in the Supreme Court, New York County,

before MULLEN, *J.*, and a jury. Throughout the trial—in the opening statement to the jury, in the cross-examination of the witnesses, and in summation—a principal defense contention was that petitioners had been entrapped. (244, 318, 668-9, 1105, 1351-4, 1364-6, 1377-8, 1381, 1390-6, 1400-3, 1442, 1444, 1448-50, 1452, 1502, 1514-5, 1526-7, 1528, 1529, 1543, 1588, 1591, 1644, 1646-7, 1650-2, 1654, 1655, 1656, 1660, 1661, 1662, 1665-6, 1668, 1685-6, 1701, 2246-7, 2250, 2252, 2253, 2255, 2274, 2282, 2344.)[1] The defense's contention in this regard had substantial support in the evidence.[2] Despite a specific defense request to instruct the jury on the issue of entrapment (2400), the trial judge, in accordance with what is the commonly accepted notion of New York law—*i.e.*, that entrapment is not available as a defense[3]—refused the requested instruction.

Petitioners' judgment of conviction was appealed to the Appellate Division, First Department, and that court affirmed their conviction, one judge dissenting. The petitioners argued there that the failure of the trial court to submit the issue of entrapment to the jury violated their rights under the Due Process Clause (Petitioners' brief in the Appellate Division, p. 23). Mr. Justice STEVENS, who dissented from the judgment of the Appellate Division, did

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[1] References are to pages of the printed Record on Appeal to the Court of Appeals.

[2] The evidence in this connection is summarized and analyzed in detail at pp. 12-15 of petitioners' brief in the Court of Appeals, and pp. 4-7 of petitioners' brief in support of their motion for reargument, printed in full in the Appendix hereto for the convenience of the Court (Appendices D and E, pp. 7a-13a).

[3] See, *e.g.*, *People* v. *Schacher* (N. Y. C. Mag. Ct. 1944) 47 N. Y. S. 2d 371, 372 (Not officially reported). See also, Williams *"The Defense of Entrapment and Related Problems in Criminal Prosecution"*, 28 Fordham L. Rev. 399, 400. Only recently, the New York State legislature, recognizing that entrapment is not presently a defense in New York State Courts, amended the law to create such a defense, ostensibly for the first time. (Revised Penal Law, § 35.40, enacted by L. 1965, ch. 1030; and Revisor's comments thereto.) The new law becomes effective September 1, 1967.

so on the basis that ". . . the contrary evidence not being so overwhelming as to warrant the Court concluding as a matter of law that no entrapment existed, the issue, as one of fact, should have been submitted to the jury." (24 App. Div. 2d 560, at p. 561.) The majority wrote no opinion.

Petitioners, after leave to appeal was granted by BURKE, *J.*, appealed their convictions to the Court of Appeals. That court affirmed their conviction. In their brief to the Court of Appeals, petitioners argued that the failure to submit the issue of entrapment to the jury constituted a denial of Due Process, guaranteed them by the XIV Amendment to the Constitution. (Petitioners' Brief in the Court of Appeals, p. 32).

Petitioner's motion for reargument, or in the alternative, to amend the remittitur to indicate that federal questions necessarily had been passed upon by the Court of Appeals was granted to the extent that the court amended the remittitur by adding the following:

> "Upon the appeal herein appellants contended that they were denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the trial court's failure to submit the issue of 'entrapment' to the jury. The Court of Appeals held that the appellants' constitutional rights were not violated."

REASONS FOR GRANTING THE WRIT

I. Petitioners' Constitutional Rights Under the XIV Amendment Were Infringed.

1. The decision in this case represents the first time that the Court of Appeals of the State of New York has had the question of whether entrapment is available as a defense to a criminal prosecution squarely presented to it. New York (with the possible exception of Tennessee) is the only state jurisdiction which has not affirmatively recognized this defense. (See list of citations, p. 6a, Appen-

dix C.) In fact, the commonly held notion in New York is that entrapment is not a defense there (see n. 3, *supra*),[4] and undoubtedly the trial court's refusal to instruct the jury on entrapment stemmed from this belief.

This Court considered the defense of entrapment in the context of the federal system for the first time in *Sorrells* v. *United States* (1932) 287 U. S. 435, and wrote that "common justice requires that the accused be permitted to prove" that he is a person otherwise innocent, whom the Government seeks to punish for an offense which is "the product of the creative activity of its own officials" (287 U. S., at p. 451). While this Court has not yet had occasion specifically to characterize entrapment as a denial of Due Process, it is respectfully submitted that the practice of entrapment is so objectionable to the fair and orderly administration of justice as to amount to such a denial. Likening entrapment to the patently constitutionally objectionable practices of coercing confessions and making unlawful searches, this Court, in *Sherman* v. *United States* [(1958) 356 U. S. 369, at p. 372] set its face against conviction obtained by such means. Mr. Justice FRANKFURTER, in a concurring opinion, voiced the rationale of the rule as follows (356 U. S., at 380):

> ". . . even if his guilt be admitted, the methods employed on behalf of the Government to bring about convictions cannot be countenanced.
>
> • • •
>
> "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."

Accordingly, it is submitted that Petitioners were denied Due Process of Law by the trial court's failure to submit the issue of entrapment to the jury.

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[4] The currency of this notion is pointed up by a statement made by trial counsel for petitioner Roper to the trial court:

> "Now, I recognize that entrapment, as such, is not a defense in this State Court, even if the Court is satisfied that there was an entrapment." (1701)

II. The Questions Involved Are Important to The Fair and Orderly Administration of Justice.

1. The question of whether entrapment is a matter of Due Process is a subject of conflict between the Seventh Circuit and the Ninth Circuit Courts of Appeals. Compare *Banks* v. *United States* (CA 9th Cir. 1957) 249 F. 2d 672, with *United States ex rel. Hall* v. *People of the State of Illinois* (CA 7th Cir. 1964) 329 F. 2d 354. The instant case presents an opportunity for this Court to resolve that conflict and settle once and for all whether or not entrapment is to be considered a Due Process defense. A determination that entrapment is or is not a defense of constitutional magnitude is important to the administration of federal criminal justice in view of the circumstance that many motions under 28 U. S. C. § 2255 seeking collaterally to attack both state and federal convictions are on the ground that the applicant had been entrapped by the authorities. See, e.g., *United States* v. *Bailey* (CA 7th Cir. 1964) 331 F. 2d 218, 220.

2. Clearly under the present state of the law a New York accused is treated differently with respect to his defense, depending on whether he is a state or a federal defendant. Thus, a federal defendant can plead entrapment and thereby avoid conviction, while a state defendant, who is equally the victim of entrapment by the authorities, has no such rights. The corollary, of course, is that federal and state law enforcement officers are held to fundamentally different standards of conduct in the investigation and apprehension of suspects of a crime. The New York State officer can still actively encourage an individual to commit a crime, and then arrest him for it, while, of course, the federal officer cannot. The possibilities inherent in this situation are similar to those which existed when the "Silver Platter" doctrine was extant. We submit, moreover, that the possibilities for real abuses are not mere theoretical ones. Most common of the cases in

which entrapment is pleaded is the narcotics case. It is common knowledge that federal and state authorities cooperate extremely closely, especially in New York, in the investigation of narcotics violations. This being so, unless this Court rules that entrapment is a violation of an accused's rights under the XIV Amendment, law enforcement authorities will be prone to choose the state forum, rather than the federal one, in order to avoid an acquittal of the defendant based on his entrapment. An unbecoming "shopping" for a favorable jurisdiction, based on procedural differences, should not be available to law enforcement officers, faced with the duty of prosecuting a crime which is cognizable in both the federal and state courts. Such an avenue of discretion will make for a disrespect for the law, and will result in inequities and injustices inimical to the effective administration of justice.

CONCLUSION

The Petition for Certiorari Should be Granted.

Respectfully submitted,

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June, 1966

APPENDIX A

Opinion in the Court of Appeals

Reported in 17 N. Y. 2d 711.

The judgments of the Appellate Division should be affirmed. We need not decide whether entrapment is currently recognized as a defense in New York since, even if it is, the present case did not create an issue of fact requiring submission to the jury (cf., Revised Penal Law, § 35.40, enacted by L. 1965, ch. 1030, eff. Sept. 1, 1967). No error was committed by the trial court in refusing appellants' request to test the accuracy of Minifon transcripts by requiring the jury to attempt to identify the voices and dialogue without them or by having a court reporter transcribe the tapes as they were being played for the jury. The appellants were afforded considerable latitude to test the transcripts, and all prior transcripts were made available (*People* v. *Rosario,* 9 N Y 2d 286; *People* v. *O'Keefe,* 281 App. Div. 409, affd. 306 N. Y. 619, cert. den. 347 U. S. 989). We have examined the additional assignments of error and find them to be without merit.

APPENDIX B

Opinion in Appellate Division, First Department

Reported in 24 A. D. 2d 560.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. EUSTACE ROPER, NUNZIO PROVENZANO and SALVATORE BRIGUGLIO, Appellants.

APPEAL from a judgment of the Supreme Court, New York County, rendered March 5, 1963, upon a verdict convicting defendants of the crime of attempt to commit grand larceny by false pretenses.

Judgment of conviction affirmed.

STEVENS, J. (dissenting). I dissent and vote to reverse and order a new trial. In my opinion, the question of entrapment should have been charged by the court and submitted to the jury as any other issue of fact.

The initial contact in this case was made by the witness Braun, who spoke to a neighbor and was introduced by telephone by such neighbor to defendant Roper. Braun apparently sought a method, not only of terminating the picketing of his establishment but of avoiding an election and being rid of certain employees. When the desired solution was not afforded immediately the matter rested. It was revived when Braun again made an approach as a result of Braun's visit to the office of and with some indication that it was at the instigation of the District Attorney. Braun with some degree of effort revived contact with Roper. He had to recall himself to such defendant upon his first completed telephonic conversation. What happened in the first and subsequent telephone conversations which were initiated by Braun appears from the transcript of the recordings in evidence. What happened upon the first arranged meeting is not so clear for, among other circumstances, Braun kept cutting the minifon off and on again. Whether such actions were due to inexperience or because of a desire for selectivity one can only hazard a

guess. The fact is in this important first meeting, set up at Braun's instance, we are lacking in complete recorded details, and the accounts of what transpired then, and subsequently, differ. Also, it appears that there was considerable drinking at the various meetings.

The People urge entrapment is not a defense in New York and their position is not without support in the cases cited by them. Analysis of some of such cases indicates either that the defendant was the moving force in the wrongdoing, or that the defendant was already predisposed to commit the crime, or that he was engaged in the doing of criminal acts and was afforded an additional opportunity, or the accomplishment of the deed was made easier. For example, in *People* v. *Krivitzky* (168 N. Y. 182 [1901]), the defendant was engaged in counterfeiting the label and trade-mark of Martell & Co. and Miller, the complainant and special agent of Martell, requested labels, the printing of which led to defendant's apprehension. To the cry of entrapment, the court rightly rejected such defense, observing the "purpose of the owners, or of their agent * * * was to ascertain if appellant was engaged in the unlawful business and that the information was obtained in transaction had between them is no defense" (p. 186). And in *People* v. *Gardner* (144 N. Y. 119 [1894]), the defendant, convicted of extortion, had sought out and approached the complaining witness with the proposition that she pay him money, specifically $150. In *People* v. *Mills* (178 N. Y. 274 [1904]), the court pointed out defendant "proposed the scheme and put in motion the forces by which the indictments were actually removed from the files of the court and delivered to him" (p. 288). There, as the court observed, even if defendant had not instigated the crime but took the indictments, property of the State, knowing what they were, with intent to steal, he would still have been guilty of the offense charged. The dictum "The courts do not look to see who held out the bait, but to see who took it" (p. 289), must be

read against the background which spawned it. So in *People* v. *Conrad* (102 App. Div. 566 [1905], affd. 182 N. Y. 529) the defendant, convicted of the crime of an attempt to commit the crime of abortion, "was not a passive instrument in the hands of the entrapping parties. He did the act * * * voluntarily, with full knowledge of the subject and of the consequences which would flow therefrom" (pp. 567-568). In *People* v. *Moore* (142 App. Div. 402 [1911], affd. 201 N. Y. 570) the trap for the defendant merely caught the procurer who had done everything to complete the crime. Facilitation of accomplishment to one intent on committing a crime is not entrapment (*Sherman* v. *United States,* 356 U. S. 369). In the cases cited it may fairly be said as a matter of law there was no entrapment and so the issue need not have been submitted to the jury or, if submitted, rejection by the jury would have been fully warranted.

I do not say there was entrapment in the case before us. That should be for the jury to determine. I go no further than to say the issue was raised as a defense, and the contrary evidence not being so overwhelming as to warrant the court concluding as a matter of law that no entrapment existed, the issue, as one of fact, should have been submitted to the jury. Like all other defenses when properly raised, a defendant is entitled to have the merits of such defense fairly considered and passed upon by the jury.

"In charging the jury, the court must state to them, all matters of law which it thinks necessary for their information in giving their verdict and must, if requested, in addition to what it may deem it its duty to say, inform the jury that they are the exclusive judges of *all* questions of fact" (Code Crim. Pro., § 420, emphasis supplied). In light of the conflicting versions of the occurrences, and particularly in view of the fact that these defendants had no prior criminal record indicative of a continuing course

of conduct, the question of entrapment was a question of fact. Questions of fact are for the jury (*People* v. *Walker*, 198 N. Y. 329). It might be noted that the proposed New York Penal Law (§ 75.05) recognizes entrapment as a defense.

A plea of not guilty puts in issue every material fact essential to the commission of the crime and the defense of entrapment can be raised under such a plea (Cf. *Sorrells* v. *United States*, 287 U. S. 435). The factual issue would be whether otherwise unwilling persons were induced to commit a crime, or whether these defendants were already so predisposed and were merely afforded an opportunity to do so. "Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials" (*Sherman* v. *United States*, 356 U. S. 369, 372, *supra*; *Sorrells* v. *United States*, 287 U. S. 435, *supra*) and unless it can be decided as a matter of law, the issue should always be one for the jury. No legal agency should attempt to create a crime in order to punish it, and if the issue be properly raised, like all issues of fact it should go to the jury for resolution.

Botein, P. J., Rabin, McNally and Eager, JJ., concur in decision; Stevens, J., dissents in opinion.

Judgment of conviction affirmed.

APPENDIX C

List of Citations

Showing Law of Entrapment in Jurisdictions Other Than New York

ALABAMA: *Johnson* v. *State* (1952) 36 Ala. App. 634; ARIZONA: *Hoy* v. *State* (1939) 53 Ariz. 440; CALIFORNIA: *People* v. *Jackson* (1954) 42 Cal. 2d 540; COLORADO: *Reigan* v. *People* (1949) 120 Colo. 472; CONNECTICUT: *State* v. *Marquardt* (1952) 139 Conn. 1; FLORIDA: *Peters* v. *Brown* (Sup. Ct. Fla. 1951) 55 So. 2d 334; GEORGIA: *Sutton* v. *State* (1938) 59 Ga. App. 198; HAWAII: *Terr.* v. *Desha* (1930) 31 Haw. 474; IDAHO: *State* v. *Mantis* (1920) 32 Idaho 724; ILLINOIS: *People* v. *Outten* (1958) Ill. 2d 21; INDIANA: *Ditton* v. *State* (1943) 222 Ind. 25; IOWA: *State* v. *Heeron* (1929) 208 Iowa 1151; KANSAS: *State* v. *Leopold* (1952) 172 Kan. 371; KENTUCKY: *Scott* v. *Commonwealth* (1946) 303 Ky. 353; LOUISIANA: *State* v. *Turner* (1961) 241 La. 94; MAINE: *State* v. *Calanti* (1946) 142 Me. 59; MARYLAND: *Callahan* v. *State* (1932) 163 Md. 298; MICHIGAN: *People* v. *Smith* (1941) 296 Mich. 176; MINNESOTA: *State* v. *Poa* (1955) 245 Minn. 438; MISSISSIPPI: *McLemore* v. *State* (1960) 241 Miss. 664; MISSOURI: *State* v. *Stolberg* (1928) 318 Mo. 958; MONTANA: *State* v. *Neely* (1931) 90 Mont. 199; NEVADA: *In re Davidson* (1947) 64 Nev. 514; NEW HAMPSHIRE: *State* v. *Del Bianco* (N. H. 1951) 96 N. H. 436; NEW JERSEY: *State* v. *Rosenberg* (1955) 37 N. J. Super. 197; NEW MEXICO: *Kearns* v. *Aragon* (1959) 65 N. M. 119; NORTH CAROLINA: *State* v. *Nelson* (1950) 232 N. C. 602; NORTH DAKOTA: *State* v. *Currie* (1905) 13 N. D. 655; OHIO: *State* v. *Miller* (1948) 85 Ohio App. 376; OKLAHOMA: *Beasley* v. *State* (Okla. Ct. of Crim. App. 1955) 282 P 2d 249; OREGON: *State* v. *Beeson* (1923) 106 Or. 134; PENNSYLVANIA: *Commonwealth* v. *Kutler* (1953) 173 Pa. Super. 153; SOUTH CAROLINA: *State* v. *Jacobs* (1961) 238 S. C. 234; SOUTH DAKOTA: *City of Sioux Falls* v. *Farnestad* (1946) 71 S. D. 98; TEXAS: *Cooper* v. *State* (1956) 162 Tex. Crim. 624; UTAH: *State* v. *McCornish* (1921) 59 Utah 58; VIRGINIA: *Falden* v. *Commonwealth* (1937) 167 Va. 549; WASHINGTON: *State* v. *Ragan* (1930) 157 Wash. 130; WEST VIRGINIA: *State* v. *Jarvis* (1928) 105 W. Va. 499; WISCONSIN: *State* v. *Hochman* (1957) 2 Wis. 2d 410.

APPENDIX D

Excerpts from Petitioners' Brief in the Court of Appeals Summarizing and Analyzing the Record Evidence of Entrapment

(Pp. 12-15)

Certainly, the evidence adduced lent itself, reasonably, to an inference that the prosecution had initiated the commission of any crime involved in the case. Thus, Hubert Braun, the People's principal witness, and the owner of a business which was being picketed by a Teamster Union local, testified that through the good offices of a neighbor, he had telephoned Eustace Roper, one of the defendants, in September, 1962, to ask the latter to assist him with respect to his labor troubles (711). It was undisputed that it was Braun who sought out Roper, a man then unknown to him (714). There was nothing in this original conversation which could be construed as unlawful or conspiratorial; Roper merely said he would try to help Braun. More than two-and-a-half months later, Braun, at the request of the assistant prosecutor, was summoned to the District Attorney's office (718-9). Braun and Roper had never been in touch with each other since the former's original telephone call to Roper. At the prosecutor's suggestion, Braun called Roper (720):

> "Q. Did you tell me about that phone call to Mr. Roper?
>
> "A. Yes, sir.
>
> "Q. As a result of that conversation that you had with me on November 1, 1961, what did you do?
>
> "A. I proceeded to try and get in touch with Mr. Roper by phone.
>
> "Q. For what purpose?
>
> "A. To see if that offer was still open."

Repeated calls were unavailing, and it was not until November 30th that Braun was able to speak to Roper, who had been "busy" (721-2). At that time, the tapped tele-

phone conversation between them clearly reveals that Roper had forgotten all about Braun and his original appeal for help (724):

> "And I introduced myself to Mr. Roper again. I said, 'I'm this party that's got this 810 trouble over in New York City.' And I said, 'We're still standing them off.' I said, 'but in the meantime things have gone from bad to worse.' I said, 'Since the time I spoke with you'—he says 'You'll have to refresh my memory.' And I told him who I was, and so on."

Roper reported that he had spoken to someone, but that there was nothing he could do. Indeed, he suggested to Braun that the latter should try the perfectly legal procedure of a Labor Board election (725). Braun persisted; apparently, the prosecutor had instructed him to ask Roper for a "figure," and it was Braun who told Roper that he was willing to pay money to prevent unionization of his business (People's Exhibit 8A):

> "Braun: And, er, I, I don't know what kind of a figure is involved or anything else—but Jesus, for one, I have to be very honest—we don't want this union—I don't think they want to unionize this shop—because they wouldn't have done it like they did—"

Braun was obviously well aware that he was suggesting something unlawful ["BRAUN: Ed—better if I call you—I'll tell you why, the N. L. R. B. has got guys all over the joint here" (People's Exhibit 8A, *supra*)]. Roper's intentions, in contrast, as revealed by the conversation, certainly appeared to be anything but criminal. Thus, Roper suggested that Braun should follow established N. L. R. B. procedures for an election, and that he should see one

Appendix D

Arlock, an N. L. R. B. official who was a friend of Roper's, to enlist the latter's aid (People's Exhibit 8A, *supra*).

If Roper were really contemplating larceny or bribery, it is hardly likely that he would have wanted the N. L. R. B. to be a party to his scheme, or that he would have advised Braun to enlist the aid of the N. L. R. B. to solve his problems through normal procedures.

Braun called Roper again on December 1st. This call, too, was secretly recorded. Several subsequent calls resulted in a meeting on December 4, 1961, with defendant Roper. Hubert Braun and the District Attorney prepared for this meeting, as they did for all subsequent ones, by "bugging" Braun's person with a minifon recording device. Immediately after this meeting with defendant and after all subsequent ones, Braun reported back to the District Attorney's office.

Braun again telephoned defendant Roper on December 8, 1961, placing the call from a telephone booth on the ninth floor of the District Attorney's office, to arrange a meeting that afternoon. Both the telephone conversation and the conversation among the three defendants and Braun were surreptitiously recorded. A second meeting on December 8, 1961, with the three defendants, Braun and Milton Silverman present also took place. This, too, was recorded.

On December 11, 1961, Braun phoned Roper again to arrange a final meeting for December 12th, telling Roper that "it was a deal," but that he still wanted to talk some things over with him. This talk was recorded also.

The morning of December 12, 1961, represented the culmination of what may be fairly described as efforts to snare the defendants. Braun produced $2,000 in cash at the prosecutor's office; this sum was then placed in a travel folder supplied by Braun and stapled together. The travel folder was then handed over to defendant Roper, and when a prearranged signal was given by Braun to waiting detectives, Roper was arrested.

Appendix D

A jury would have been justified in finding that Braun, under the prosecutor's tutelage, had instigated, encouraged and persuaded Roper and his co-defendants to move along a clearly unlawful path. When it is taken into account that none of the defendants had ever been convicted of any crime before the present trial; that not one iota of evidence was introduced demonstrating a predisposition on the part of any of the defendants to participate in criminal ventures of this sort; that the defendants had not been under any sort of suspicion whatsoever at the time the initial communication by Braun was made; and that each defendant took the stand, and implemented his plea of "not guilty" by affirmative testimony; that it was Braun who had tried to entice them into helping him in the manner described; it becomes clear that a reasonable jury would have had ample warrant for concluding that the defendants had been entrapped by an agent of the District Attorney.

At the very least, we submit, it was certainly a *possible* inference from the evidence, that any unlawful intent in the transaction had been initiated by Braun, working hand-in-hand with the prosecutors.

APPENDIX E

Excerpts from Petitioners' Brief in the Court of Appeals in Support of Motion for Reargument Summarizing and Analyzing the Record Evidence of Entrapment

(Pp. 4-7)

We respectfully refer the Court to pp. 10-15 of defendants-appellants' brief, wherein the record evidence on the issue of entrapment is analyzed in detail. But there are two undisputed circumstances shown in the record, either of which, we submit, is sufficient to raise a jury question on entrapment, and to which we direct the Court's attention.

1. It was Hubert Braun, the People's principal witness and the owner of a business which was having labor troubles, who, at the request of the prosecutor, called Eustace Roper, and made the initial proposal to Roper that he embark on an unlawful cause of conduct, to wit, that he assist Braun is preventing the unionization of Braun's business. This is shown by the prosecution's own evidence. Thus, Braun's call to Roper on November 30, 1961, was the first time anything which could be construed as unlawful was discussed, and it was *Braun,* in accordance with the prosecutor's instructions—*not* Roper—who made the unlawful suggestion (pp. 12-13, defendants-appellants' brief). Moreover, Roper acceded to Braun's entreaty to help him in his labor troubles only after persistent urging by Braun at the prosecutor's behest. Roper, at first rather than agreeing to help Braun, told the latter to go to the N. L. R. B. (pp. 7, 13, defendants-appellants' brief). There is absolutely no evidence that Roper or any other of the defendants-appellants would ever have communicated with Braun or had anything whatever to do with him, had the phone call of November 30 not been made at the prosecutor's instance. But for that call there would have been no case today. At pp. 15-16 of his brief, the prosecutor argues that the purpose behind having Braun call Roper was

"investigation—to 'find the truth though it be hid in the center' ". Granted that this may have indeed been the prosecutor's purpose, nevertheless, it is a fair inference, and a jury might have found, that the inspiration for whatever defendants-appellants actually *did* emanated from the November 30th phone call.

2. A second circumstance from which a jury might have found that the defendants-appellants were lured by the prosecutor into an unlawful course of conduct is that Braun, acting under the jurisdiction of the district attorney, held out the promise of financial reward to them. Thus, Braun told Roper that he would be willing to pay money to prevent the unionization of his business (p. 13, defendants-appellants' brief). This fact alone we submit, required that an instruction on entrapment be given to the jury. See, *Johnson* v. *United States* (C. A. D. C. 1963) 317 F. 2d 127. In *Johnson, supra,* which involved a conviction for the possession of narcotics, the *only* evidence in the case bearing on entrapment was that a police officer had furnished money to an "intermediary", acting for the government, who in turn gave the money to the defendant for the purpose of buying narcotics. The defendant was allowed by the "intermediary" to keep one of the capsules containing a narcotic substance as his "reward" for carrying out the transactions—*i.e.,* buying the narcotics. The trial court, despite the defense's request, refused to instruct the jury on entrapment. Unlike the case at bar, where there is clear evidence, in addition to the offer of money, that the prosecution urged defendants-appellants to commit a crime, in *Johnson* there was absolutely no evidence of importuning or persuasion, other than the offer of "reward". Yet the Federal Court of Appeals reversed the conviction, holding that the evidence of entrapment, though very weak, was not "non-existent", and that, therefore, the defense was entitled to an instruction on entrapment. The Court wrote as follows (*id.,* 317 F. 2d, at p. 130):

Appendix E

> "It is reasonable to characterize the evidence of entrapment in this case as not strong; yet we think it was not so weak as to be non-existent in the eyes of the law applicable to the subjects. That is the basis for our decision."

Notably, too, the prosecutor does not dispute the existence of evidence that defendants-appellants were entrapped. He argues only that, if entrapped, the defendants-appellants were entrapped into "conspiring to give a bribe to Silverman"—of which they were acquitted—not committing the crime of false pretenses, of which they were convicted (p. 17, Respondent's Brief). However, if the prosecution can avoid the defense of entrapment merely by characterizing conduct which it inspired as falling under one particular legal rubric as opposed to another, the whole policy underlying that defense would easily be frustrated. The plain fact remains, that the prosecution was responsible for starting the chain of events which resulted in the defendants-appellants doing the acts for which they were convicted. It is the "methods employed on behalf of the Government to bring about conviction" which "cannot be countenanced" (concurring opinion, *Frankfurter, J., Sherman* v. *U. S.* [1958] 356 U. S. 369, 380). ". . . The government cannot be permitted to contend that he is guilty of crime where the government officials are the instigators of his conduct" (*Sorrells* v. *United States* [1932] 287 U. S. 435, 452).

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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 226

EUSTACE ROPER, NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONSE OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1966

No. 408

EUSTACE ROPER, NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONSE OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

The People of the State of New York, by FRANK S. HOGAN, District Attorney of New York County, respond as follows:

1. This case does not pose a substantial federal question for cognizance on certiorari.

2. The New York Court of Appeals unanimously affirmed the judgment of conviction of the petitioners herein, New Jersey Teamsters Union officials, of Attempted

Grand Larceny in the First Degree by False Pretenses, in that they had falsely represented to a New York employer that one Silverman, President of a picketing New York local of their union, had agreed to accept a $10,000 bribe in order to enter into an "easy" union contract, and that Silverman had requested that it be paid to the defendants for delivery to him. (The petitioners were sentenced to serve a term of two to four years in State Prison.) In so affirming, the Court said, insofar as here applicable (17 N. Y. 2d 711):

> "The judgments of the Appellate Division should be affirmed. *We need not decide* whether entrapment is currently recognized as a defense in New York since, *even if it is*, the present case did not create an issue of fact requiring submission to the jury (cf., McKinney's Revised Penal Law, Sec. 35.50, effective September 1, 1967)." (emphasis supplied).

It held, by the same token, that failure to submit the issue of entrapment to the jury did not violate the defendants' constitutional rights.

In denying their application for bail, Mr. Justice Harlan wrote:

> "I consider it too unlikely that certiorari will be granted to warrant my delaying execution of this state sentence."

3. Contrary to the petitioners' claim premised on the assertion that "there is undisputed evidence that it was the prosecutor who, through his agent, made the *initial proposal* to defendant that he embark on the unlawful

course of conduct resulting in the defendant's indictment" [petition, p. 2 ("Questions Presented I (1)"]: The record evidence shows that *long before* Braun (a New York employer, whose plant, employees and customers were plagued by personal injury and property damage by a picketing New York Local 810 of the Teamsters Union) had conferred thereon with the district attorney, he, Braun had held a phone conversation with the defendant Roper —a friend's friend—who was an official of a New Jersey local of the Teamsters. Braun had detailed to him the violence inflicted by the 810 people, and asked Roper if there was "anything he [Roper] could do to help us get rid of these people" (714),* "anything we can do?" (715). What Roper had said was not merely that he would try to "help" Braun (petition, Appendix D, 7A), but he proposed to Braun that when he, Roper, would see someone from that "outfit," and "maybe we can get you straightened out," that *"It may cost a couple of bucks"*—$500 or $1000—*so "they" can get their "expenses;"* that "they" were a "pretty lousy bunch" "inclined to play rough" (713-716; Assistant District Attorney Perrin's notes of November 21 conference with Braun, Defendants' Exh. Q). The foregoing was hardly consonant with initial innocence. Thereafter, *and before the prosecutor entered the picture,* the testimony shows that Roper was actively contacting various people in the matter, including the defendant Provenzano, who was a friend of Silverman, President of the picketing Local 810, and seeing Silverman personally (1727, 1784; 258-9, 260, 500). Indeed, when the district attorney launched his investigation and sought to get to the bottom of the matter—to discover, through Roper,

* Unless otherwise indicated, references are to the printed record on appeal in the New York Court of Appeals.

who it was who was pulling the strings of violence and whether the motivation of the manipulator was illegal—including, as the defendants put it, "if the officials of the *picketing local* were seeking a bribe, or attempting a shakedown" (defendants' brief in Court of Appeals, p. 6; emphasis supplied), and Braun at the prosecutor's suggestion contacted Roper, Roper had only shortly before that been in contact with Provenzano on the matter (1784). Far from having "forgotten all about Braun and his original appeal for help" (petition, p. 8A), Roper's telephone conversation (Exh. 8A) showed that once he satisfied himself as to who his caller was, he evinced a ready complaisance. Thus, when Braun reminded him of his, Braun's previous wish "if there's some way to get this guy off our back" (Exh. 8A, p. 2) and Braun wondered if Roper wanted to "talk to the fellow again" and see if there was "something we could work out," Roper said "all right" (Exh. 8A, p. 2), and on Braun saying he did not want "this union," and doubted from their actions if they wanted to unionize this shop, and wondered "if this guy got some figure in mind," Roper responded that he would "get in touch with the guy right now" (*ibid.*, p. 3). Suggesting that Braun try an angle with Roper's friend at NLRB, Roper declared, "I'll try this other angle—and see what we can work out" (Exh. 8A). Thereafter, Roper was an eager beaver (Exhs. 8B, 8C, 8D, 8E) coming back with a claimed proposal from Silverman's 810 for an easy contract with that union—a "contract you can live with," for which, "they" wanted "important dough" a "ten grand" payoff (749-50); an enterprise Roper avidly promoted, joined by the other defendants, who also were offi-

cials of New Jersey Teamster locals (753, 762, 765-80, 782, 786-7, 793, 795).

4. In any event, as establishing the frivolousness of this petition, suffice it to say that the defendants were *acquitted* of the charge of conspiring to bribe President Silverman as labor representative of Local 810 with $10,000 to influence him to give an easy union contract; but were convicted of attempted grand larceny by falsely pretending that Silverman had agreed to take $10,000 for the "easy union contract"—a crime whose origin of intent was completely within the secret recesses of the defendant Roper's mind and that of his confederates, unbeknown to the prosecution or Braun.

For, as we stated in our Court of Appeals brief (p. 17):

> Even assuming only for argument's sake, without conceding in any wise, that it might be a defense in New York if the criminal intent to commit the crime of which a person was convicted originated in the mind of an agent of the state with the purpose of persuading the defendant to commit that crime, we note that even on the defendants' view here, the purpose of the prosecutor was to see, *if the officials of the picketing local* and particularly Silverman, *were seeking a bribe or attempting* a shakedown. Thus, the most that could have been argued on a claim of entrapment was that the defendants may have been encouraged in *conspiring to give a bribe* to Silverman. The defendants were, however, in any event, *acquitted* of the conspiracy charge. What they were convicted of, was a brazen attempt to steal by *falsely represent-*

ing that Silverman had agreed to be bribed; an intent and act originating in the secret recesses of the minds of Roper and his confreres unbeknown to prosecutor or complainant.

The offenders acted of their own volition in making *false* representations and were simply caught in their own devices, even assuming without conceding here the governmental use of a decoy intended to discover a conspiracy to bribe. Even where entrapment is recognized as a defense, as in *State* v. *Marquardt,* 139 Conn. 1, 8, relied on by the defendants, "The principle referred to as entrapment places no limitation upon the right of the officers of the law to obtain evidence of any crime originating in the mind of another." Indeed, since the defendants themselves concede that where the 'origin of intent' is with the defendants, and not with the authorities, the defense of entrapment is not available (their p. 26); the claim of entrapment fails here." (emphases quoted)

5. Contrary to the petitioners' claim (petition, p. 5; also, p. 3) that the trial court "refused" to "instruct the jury on entrapment" because of the "commonly held notion in New York that entrapment is not a defense," we find no showing that the specific charge which was requested (2408) was denied on that ground. Indeed, the defendants throughout the trial were given full leeway to offer any evidence as to claimed "entrapment"; in conformity with the trial court's having volunteered, early in the trial, to deal with the subject of entrapment in its charge; for, as the petitioners themselves acknowledged in their New York Court of Appeals brief (p. 16): "When the subject of entrapment was raised early in the trial, the court had volunteered a promise to deal with the mat-

ter in its charge'' (318). Moreover, respecting their quotation from *Sorrells* v. *United States* (1932) 287 U. S. 435, at 451, that a defendant must be ''permitted to prove'' that he is a ''person otherwise innocent'' (petition, p. 5), there was no showing that they were precluded from offering any such proof, or any other proof on their entrapment claim.

6. We observe, merely in passing, that this Court has concededly not declared ''entrapment'' to be a due process defense. *Sorrells* v. *United States,* 287 U. S. 435, and *Sherman* v. *United States,* 356 U. S. 369, were decided on the facts therein, as a matter of public policy in the construction of federal statutes. The petitioners' claim (p. 6), that there is a conflict between the Seventh and Ninth Circuits as to whether ''entrapment'' is a matter of due process, is inaccurate. *United States* v. *Bailey* (CCA 7th 1964) 331 F. 2d 218, 220 (holding that it is not, citing 5th, 8th, 9th and 10th Circuits), points out with regard to *Banks* v. *United States* (CCA 9th 1957) 249 F. 2d 672 (on which the defendant relies), that in the second *Banks* case (258 F. 2d 318, at 319 (1958), cert. den. 358 U. S. 886, the Ninth Circuit held that failure of the court to pass on the merits of the entrapment claim did not involve a violation of the constitutional rights of appellant. In any event, as the petitioners acknowledged, (1) the defense is not available where the ''origin of the intent'' is with the defendant, and not with the authorities (Ct. App., 26); (2) the known predisposition of a defendant to commit the offense for which he is charged serves to refute a claim of entrapment (Ct. App. p. 26), and (3) even the setting of a trap by the authorities for one already bent on committing a

crime does not constitute entrapment (*ibid.*). The defense of "entrapment" would not have been available on the instant facts even in jurisdictions whose highest courts, finding occasion to decide thereon, recognized such defense (cf., New York L. 1965, *supra,* noted by the Court of Appeals, which sets forth the legislative definition of entrapment, effective Sept. 1, 1967).

7. Indeed, the petitioners can hardly claim here that New York has "failed to recognize" "entrapment" as a defense (petition, pp. 2, II). While the People argued in the Court of Appeals that it was not a defense (but that even if it were, the defense of "entrapment" would not have been available on the instant facts in jurisdictions allowing such defense), the petitioners, in their Court of Appeals brief, declared that although "our appellate courts have not hitherto had the occasion expressly to announce their adherence" to the doctrine of entrapment (their Court of Appeals brief, p. 20), "this is by no means to say that the courts of this state do not recognize the defense" (*ibid.,* 16; cases at 16 and 20). Moreover, the petitioners, analyzing the cases, urged that "there is no basis in the decided cases for supposing that the defense of entrapment is not available in the New York State courts" (p. 21). In any event, this case does not provide the vehicle for deciding whether "entrapment" is a due process defense, since, as the New York Court of Appeals has here stated [a court which the petitioners rightly acknowledged to be "in the forefront of those which have vigorously promoted requirements of fundamental fairness in police methods, and have just as forthrightly condemned infringements on basic human rights" (their

Court of Appeals brief, p. 20)], "even if" entrapment is currently recognized as a defense in New York,

> "the present case did not create an issue of fact requiring submission to the jury (cf., Revised Penal Law, §35.40, enacted by L. 1965, ch. 1030, eff. Sept. 1, 1967)."

Conclusion

Wherefore, the People pray that the petition for certiorari be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

HAROLD ROLAND SHAPIRO
Assistant District Attorney
Of Counsel

July, 1966

Appendix A

People's Response in the Court of Appeals to Petitioners' Motions for Reargument and to Amend Remittitur

April 20, 1966

Honorable Raymond J. Cannon, Clerk
Court of Appeals
Albany 7, New York

Re: *People* v. *Roper Provenzano* and *Briguglio*
(re: defendants-appellants' application for reargument and to amend remittitur)

Dear Mr. Cannon:

We have read the application and see nothing substantially new warranting reargument. We are perfectly content to leave the determination of the application to the Court. We do not, of course, necessarily acquiesce in any claim of the defendants-appellants, in their application, as to our position regarding the law or the facts, or as to the facts and applicable law. Our position is set forth in our main brief and the Court is familiar with the proceedings herein. We particularly note, however, one instance in which the defendants' statement of the case is not completely accurate. We refer to their statement (p. 6) that "the prosecutor does not dispute the existence of evidence that the defendants-appellants were entrapped." See our main brief at p. 17, 1st sentence of 2nd full paragraph, and the last sentence before the 1st full paragraph on our p. 21.

Regarding their application to amend the remittitur, we concede that this Court would necessarily have had to pass on the question whether the trial court's failure to submit to the jury the question of entrapment on the instant facts, was itself a denial of due process. This court held, after noting that it need not "decide whether entrapment is currently recognized as a defense in New York," that "even if it is, the present case did not create an issue of fact requiring submission to the jury (cf., McKinney's Revised Penal Law, §35.40, effective, September 1, 1967)" (Memorandum opinion). We do not believe that the Court was required to pass on whether entrapment is a constitutionally mandated defense.

Yours respectfully,

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HRS/hr
cc: Harris B. Steinberg, Esq.
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